

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Postal Rate And Fee Changes, 1997

Docket No. R97-1

**RESPONSE OF
ALLIANCE OF NONPROFIT MAILERS
TO NOTICE OF INQUIRY NO. 1**

October 3, 1997

The Alliance of Nonprofit Mailers ("ANM") respectfully submits this response to Notice of Inquiry No. 1, issued September 17, 1997. The notice invites comments on whether the Postal Service has abused the Commission's rules governing the filing of library references, and whether those rules should be changed.

(1)

The Commission's rules on library references (Rule 31 and Special Rule 5) are rules of convenience, designed to avoid the need for serving individual copies of lengthy documents upon all parties in a case, particularly when interest in the documents may be limited. Thus, Special Rule 5 in this case states in part that: "Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed."

The Commission has not set a minimum page limit or word count for designating a document as a library reference, and it is unlikely that a blanket rule of

this kind would be useful. A document of general interest and importance may warrant individual service even if voluminous; conversely, a document devoid of general interest or importance may be “too voluminous reasonably to be distributed” by individual service upon the 120-odd persons on the service list in this case even if the document is short. In the absence of a bright line standard, ANM believes that deciding which Postal Service library references were *not* “too voluminous reasonably to be distributed” is likely to be more contentious than helpful.

Rather than establish a minimum page count or word count for library references, the Commission should consider requiring parties sponsoring library references to provide individual copies to interested parties upon request. If this approach were adopted, the Commission might consider the advisability of prohibiting parties (except perhaps the Postal Service and OCA) from submitting blanket requests for copies of all library references. In addition, the Commission should make mandatory the now-voluntary practice of submitting library references in electronic form for posting on, and downloading from, the Commission’s Web site.

(2)

The formalities of designating library references are far less critical, however, than the need to ensure that data, studies or other information in a library reference, if relied upon by the sponsoring party, are open to meaningful cross-examination by other interested parties. As Nashua Photo and others have noted, the real problem with library references is their increasing misuse as a device for shielding key elements of a party’s case from cross-examination.

The Commission's rules make clear that library references, and statements made in library references, are not evidence unless and until sponsored by a witness. Rule 31(b) of the Commission's Rules of Practice and Procedure states that: "Designation of a document as a library reference . . . does not, by itself, confer any particular evidentiary status upon the document. The evidentiary status of the document is governed by this section." 39 C.F.R. §3001.31(b). Moreover, the last paragraph of Rule 5 of the Special Rules of Practice provides: "Library material is not evidence unless and until it is designated and sponsored by a witness." *Accord*, Presiding Officer's Ruling No. R97-1/20 (Sept. 17, 1997).

As Nashua Photo and others have pointed out, this rule is an empty one if parties can bootstrap critical data and studies into evidence by offering witnesses who attest to the conclusions drawn from the data and studies, but not to their underlying inputs, assumptions and methodology. A meaningful opportunity for cross-examination must include the latter as well as the former.¹

Accordingly, a party that chooses to rely on a library references in support of its case should be required to offer a witness sponsoring the library reference for cross-examination, except when the information at issue is of a kind that is normally

¹ See *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 429 (D.C. Cir. 1993); *Newsweek, Inc. v. USPS*, 663 F.2d 1186 (2d Cir. 1971), *aff'd*, *Nat'l Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. (1983). Burying critical data and studies in unsponsored library references also impairs the ability of interested parties to verify whether the Postal Service has complied with Rule 31(k) of the Commission's Rules, 39 C.F.R. § 3001.31(k), which imposes significant requirements on studies and analysis that are to be introduced into evidence or *relied upon to support evidence*.

admissible without a sponsoring witness (e.g., a statement against interest, or an admission by an adverse party).²

Furthermore, the Postal Service should be required to identify—when filing of its formal request and written case-in-chief, but in any event no later than the beginning of hearings—which portions of which library references will be sponsored into evidence, and by which witnesses. Advance notice of this information is essential. Otherwise, the Postal Service can avoid meaningful cross-examination of a library reference by designating a sponsor on the eve of his or her appearance on the witness stand—or even after he or she has left the stand. Regulatory shell games of this kind are inconsistent with a fair and orderly hearing.

Respectfully submitted,



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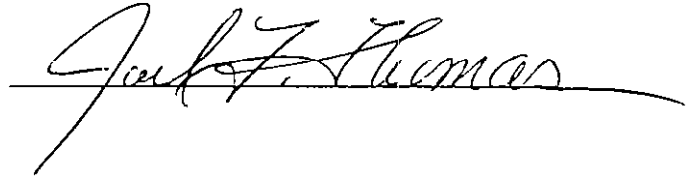
Counsel for Alliance of Nonprofit Mailers

October 3, 1997

² Parties should not be allowed to evade this requirement on the theory that the unsworn studies or data are of the type reasonably relied upon by experts in the field, if the data or study results are the themselves offered for their truth.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

A handwritten signature in cursive script, reading "Jack F. Thomas", written over a horizontal line.

October 3, 1997